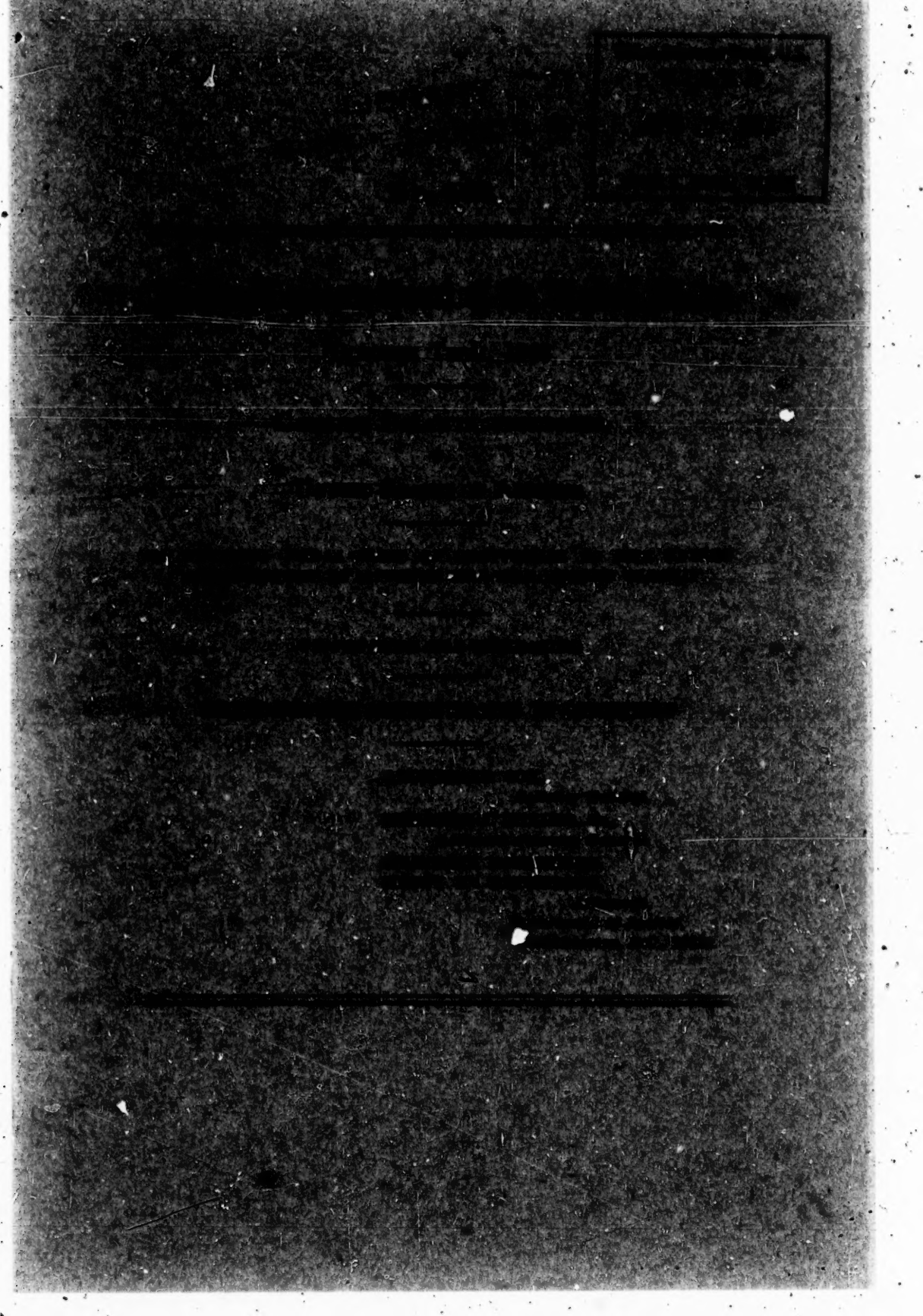

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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 468

CARMINE GALANTE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ON PETITION FOR REHEARING

BRIEF FOR THE UNITED STATES IN OPPOSITION

The petition for rehearing rests upon three contentions: (1) that notes of interviews with Smith, the government's key witness, were destroyed for purposes of circumventing the Jencks Act; (2) that the government made substantial payments to Smith to obtain his testimony; and (3) that this Court's reversal of the contempt conviction of co-defendant Panico undermines the foundation of the trial court's refusal to grant a mistrial. None of these contentions is meritorious.

1. *Alleged violation of 18 U.S.C. 3500.* Petitioner's contention in this regard relates to the alleged de-

727-309—64——1

struction of handwritten notes made by former narcotics agent Rowan. The significant part of Rowan's testimony was given during the second trial. However, in view of the fact that the petition for rehearing is based on testimony at the first trial, it becomes necessary to review the Rowan testimony chronologically, beginning with the first trial.

(a) *Rowan's testimony at the first trial.* On January 11, 1961, Smith (the government's principal witness) testified upon cross-examination that Rowan was the first man to question him as to some of the defendants (F. Tr. 4442),[1] and that Rowan did not take notes upon this occasion (F. Tr. 4447). Counsel for petitioner Mr. Wadden, told the court that the defendants should not be bound by what this witness said in that regard and asked for a voir dire examination of the four agents who had talked with Smith (F. Tr. 3264). These agents were thereafter produced by the government. Under examination by Mr. Wadden, Rowan testified that he was no longer a federal agent, but had served in that capacity from October 8, 1956, to August 15, 1960. He met Smith in January 1960, at the latter's home, talked with him four or five hours and made notes in his presence (F. Tr. 3674–3675). He conducted similar interviews on four or five later occasions and eventually transposed his notes into a progress report (F. Tr. 3675–3678—an informal document, not an official report, to be forwarded through channels. There were three or

[1] In order to avoid confusion, we use the same symbol, "F. Tr.", employed by petitioner to designate the former trial or first trial. "Tr." designates the transcript in the second trial.

four copies, the present location of which he did not know. (F. Tr. 3679–3680). Rowan testified as to his notes: "After I had transposed them into a typewritten set, I think I destroyed them" (F. Tr. 3693). "I might have put (them) in better verbiage, but substantially what I had been told" (F. Tr. 3694). Mr. Tendy, Assistant United States Attorney, stated that the prosecution had found no reports of Rowan among the three or four file cabinets of this case but would continue to search (F. Tr. 3685–3686).

At the next session of court, Rowan testified that he had found a report (marked for identification as Gov. Ex. 103) of his various interviews with Smith in a folder relating to another matter. It was not a part of the formal files (F. Tr. 3730–3731), bore no date or signature (F. Tr. 3739), and represented "the sum of three or four days of sitting down and talking with Smith and getting his story down in notes and then taking those notes and having them transcribed into a typewritten report." (F. Tr. 3740; see also 3770–3773, 3784). Rowan said that he went over the report with Smith and made various corrections in his own handwriting (F. Tr. 3750–3751). There were no other reports that would recite substantially verbatim conversations with Smith (F. Tr. 3795–3796). In response to a question by one of the defense attorneys, Rowan explicitly denied that there was any directive from his superiors to destroy his original notes (F. Tr. 3799)—"I destroyed them myself. I was finished with them."

Rowan stated that he delivered the original and a carbon to his district supervisor, Mr. Gaffney, gave

a copy to Mr. Tendy and retained one copy himself (F. Tr. 3805). He never went over the report with Mr. Gaffney (F. Tr. 3809–3810). The government agreed that the report should be turned over to the defense under 18 U.S.C. 3500. At the request of Mr. Betz, attorney for another defendant, the court instructed the witness that he should make himself available on call as a defense witness (F. Tr. 3812–3813).

On February 7, 1961, Mr. Wadden, petitioner's counsel, stated that he wished to recall Rowan for questioning about the notes. His understanding was that Rowan would be recalled as a witness for the court to give the defense an opportunity to ascertain whether he (a) destroyed his original notes, (b) transcribed them into a first-person report which he destroyed after preparing a third-person report, and (c) did this for an improper purpose and with the knowledge and acquiescence of his superiors (F. Tr. 6263). Reference was made to the fact that Rowan had testified on a motion for a new trial filed on behalf of defendants in *United States* v. *Aviles*, 197 F. Supp. 536 (S.D.N.Y.), that he had destroyed his notes to avoid production under 18 U.S.C. 3500 (F. Tr. 6294, 6301–6303).[2] Government counsel, Mr. Tendy, stated

[2] The trial judge in *Aviles* reached the following conclusions as to Rowan, 197 F. Supp. at 555: "His conduct at these hearings indicates that Rowan is emotionally unstable and testimonially unreliable. Indeed, he differed with movant's counsel with respect to what transpired during conversations between them prior to his testimony at the instant hearings.

Having observed Rowan's demeanor on the witness stand and having heard his vacillating and self contradictory testimony, and in view of his obvious bias and ill will towards

under oath that he had no recollection of ever having seen the report, Gov. Ex. 103 (F. Tr. 6334). The district court denied a motion to strike Smith's testimony (F. Tr. 6644–6658).

The defense then called Rowan as its first witness. The court questioned the propriety of going into matters already covered, but allowed counsel to proceed (F. Tr. 6660–6665). The testimony elicited from Rowan as a defense witness is the basis of the present motion.

After describing again the circumstances of his contacts with Smith in January 1960 (F. Tr. 6692–6693), Rowan testified that he made thirty or forty pages of notes (F. Tr. 6698); that his report (Gov. Ex. 103) reflected those notes (F. Tr. 6721); that he went over the report with Smith, making certain insertions, but deleting nothing (F. Tr. 6751–6752); and that the original notes were about half in the first person and half in the third person, while the report was entirely in the third person (F. Tr. 6902–6904). After a colloquy between the court and coun-

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the Federal Bureau of Narcotics and his superior, his pecuniary interest in testifying here and the credible evidence presented at these hearings, the Court finds Rowan's testimony as to his purpose at the time he destroyed the alleged notes, if in fact there were notes of the character claimed by him, unworthy of belief. A far more plausible explanation of his destruction of such notes as he may have had is simply that after having no further need for them, he destroyed them in accordance with his invariable practice."

The denial of a motion for a new trial in that case was affirmed by the court of appeals. 315 F. 2d 186. While this Court has remanded that case for reconsideration it was not in relation to Rowan's notes but to a wholly different issue.

sel as to what difference this formal change would make, the court asked (F. Tr. 6908):

> The COURT: Why did you put 103 in the third person. That is it in essence.
>
> A. So that it wouldn't fall under the Jencks decision.

Rowan further testified that he destroyed his notes "[b]ecause it was agreed that I would destroy the notes after I made up my report." This agreement, he stated, was with Gaffney and Pera, his superiors. He declared, however, that he did not receive explicit instructions and could not give the substance of his conversations with Gaffney (F. Tr. 6923, 6926). When he repeated that he had destroyed the notes, with the knowledge of his superiors, so that they would not be available, the court asked (F. Tr. 6929):

> The COURT: How? Did anybody tell you to destroy records, to destroy notes? Just answer that question.
>
> The WITNESS: Again, no, no.

Rowan testified that he told Pera and Gaffney that he was going to destroy the notes. Asked what the latter had said, Rowan replied (F. Tr. 6930):

> I don't recall, sir. * * * He just acquiesced to what I told him I was going to do. He didn't say anything.

The court inquired as to the procedure followed in preparing the report (F. Tr. 6933):

> The COURT: Did you follow the notes generally speaking?
>
> The WITNESS: Yes, sir.

* * * * *

The COURT: Did you compare the transcription with the notes?

The WITNESS: Yes, sir.

The COURT: How did it appear?

The WITNESS: It was what I had in the notes except that it had been changed to the third person in all instances.

The COURT: That was the only difference, in substance, at least?

* * * * *

The WITNESS: That's right, sir.

Q. When you dictated your report, which is GE 103, did you attempt to place in the report those things which you thought were important and leave out of the report certain matters which you felt were immaterial?

* * * * *

The WITNESS: I did make some additions involving the case about things that Smith had not told me, and I left things out that, in my opinion, were not important.[8]

The court again denied the motion to strike Smith's testimony, giving its reasons in the "Opinion of the District Court", set forth in the appendix to the petition for rehearing at pp. 1a–19a (F. Tr. 10489–10521).

[8] Rowan also testified as to the "threats" which were made against him, *i.e.*, Mr. Gaffney had called him on the phone and told him that if he testified that the report existed, Gaffney would have to get up and say certain things about him that would jeopardize his job (F. Tr. 6942, 6947). On January 5, Rowan told agent Matuozzi over the telephone that there was a report. Matuozzi said he was sorry that Rowan had told him that: that they had looked for it but couldn't find it (F. Tr. 6963). Rowan testified at the instant trial that he was asked to resign from the Bureau of Narcotics in August 1960 because he did not divulge the true circumstances of an automobile accident (Tr. 7805).

(b) *Rowan's testimony at the second trial.* At the second trial, Rowan again testified, as a defense witness, to his former employment as a narcotics agent (Tr. 7643–7644).[1] He stated that in January 1960 he told Smith that he was authorized to offer him $5,000 if he would testify for the government (Tr. 7647–7651), and also saw Smith on four other occasions closely following his initial visit (Tr. 7656–7658). He accumulated about thirty or forty pages of notes during that time (F. Tr. 7659), which he transcribed into court's exhibit A 51 A (Tr. 7661). With respect to the typewritten report which Rowan made from his notes, he testified that "[t]here are some additions and there are some deletions, and there are some corrections" (Tr. 7714); and that these changes were made by Smith, who had read the report, for purposes of clarification (Tr. 7714–7718). The report was received in evidence for the defendants without objection (Tr. 7727–7728). No motion was made to strike the testimony of Smith. At the conclusion of Rowan's testimony, the following colloquy took place (Tr. 7818):

> Mr. KRIEGER (Attorney for DiPietro and Fernandez): My second application is that would your Honor incorporate in this record the voir dire examination of this witness at

[1] The volume of the transcript which includes the testimony of Rowan at the second trial is no longer with the other volumes in the case. References to his testimony in this trial must therefore be checked to the transcript lodged by the government in *Panico* v. *United States*, No. 45, this Term.

> the previous trial in so far as it pertained to Section 3500 of Title 18, more particularly thereunder the destruction of those handwritten notes.
>
> The COURT: I will take that under advisement. My present inclination is not to.

At the conclusion of the trial, the following took place (Tr. 8051):

> The COURT: Mr. Krieger, I will incorporate the voir dire as to Rowan in this transcript and I will also adopt Judge Levet's rulings with respect to it, the motions made under 3500 with respect to it in so far as they are applicable here.
>
> Mr. KRIEGER: Yes, your Honor, thank you.
>
> The COURT: I might add that in my opinion it is no longer of any significance in view of Rowan's statement on the stand that whatever was contained in his notes was incorporated, all of it, into Court's Exhibit A 51 A for identification, and I cite United States v. Thomas.

The motion was made applicable to all defendants.

(c) *The legal consequences of Rowan's action.*

The "Jencks Act" issue was not raised in the court of appeals by any of the fifteen defendants. It was not raised in any of the petitions for certiorari. Indeed, it is highly questionable whether it was adequately raised at the trial itself. The motion to strike Smith's testimony under 18 U.S.C. 3500(d), and Judge Levet's thorough and well-reasoned opinion denying that motion, belonged to the first, abortive, trial. The motion to strike was not renewed at the

second trial. There was, to be sure, a request by one of the defense attorneys at the end of Rowan's testimony that the *voir dire* examination of Rowan from the previous trial be incorporated in the record—a request which was granted by Judge MacMahon, who also adopted Judge Levet's prior rulings. We submit that this perfunctory motion to incorporate the earlier *voir dire* was hardly tantamount to a motion to strike the testimony of the principal government witness at this long and stormy trial—a motion which, if granted, would have compelled a directed verdict of acquittal for many of the defendants. Plainly, the able and experienced lawyers who represented these defendants would not have given the matter so little attention at the trial, and refrained from raising it on appeal, had they believed their clients were in any way injured by the substitution of the typewritten report for the original longhand notes.

Even had the point been raised, there is no merit to the contention that the unavailability of the handwritten notes compels the suppression of Smith's testimony. Here, as in *Aviles* (see fn. 2, p. 4, *supra*), Rowan's contradictory statements made it difficult to determine his true motive for destroying the notes, and Judge Levet appears to have made no finding on that point. Whatever the motive, it is clear, as Judge Levet noted, that the Jencks Act was not in fact circumvented. Rowan's typewritten report, which was voluntarily turned over to the defense immediately upon its discovery (in a file not pertaining to this case), was substantially identical to the notes,

except that it was written in the third, rather than the first person. Neither the defense nor the prosecution suggested that anything of significance in the notes was omitted from the report. Apparently the only feature of the interviews with Smith which the defense found useful was the fact that Smith was initially reluctant to implicate the petitioner. But that fact was fully disclosed in the report and freely conceded by Smith on the witness stand. In these circumstances, it was entirely reasonable for the trial court to conclude that the substantial rights of the defendants were not impaired.

2. *Goverment payments to Smith.* Petitioner's assertion of improper payments to Smith rests entirely on the testimony of Rowan as a defense witness and ignores completely the other evidence in the record. That evidence makes it clear why, in the thorough briefing of this case, no other counsel has ventured to suggest that the government was engaging in bribery.

Rowan, first called to testify about his report, described in detail his first meeting with Smith in January 1960, without mentioning any conversation concerning payment to Smith of $5,000 or any other amount (F. Tr. 3674–3717). When later called as a defense witness (*supra*, pp. 5–7), he testified that, with Gaffney's authority, he offered Smith $5,000 (F. Tr. 6724), and that in March or April of 1960 Smith was placed on a per diem (F. Tr. 6827–6829). Rowan also testified that Smith had refused to go into the

grand jury until induced to do so by Gaffney's promise to pay him $1,500 (F. Tr. 6743–6744).

At the second trial Rowan stated that in January 1960, he went to Smith's home and offered him $5,000 if he would testify for the government (Tr. 7649–7650). He gave the date of Smith's alleged refusal to testify and the promise of $1,500 as February 15, 1960 (Tr. 7702–7703). Rowan again testified that in March or April of 1960 Gaffney arranged for Smith to be paid a per diem (Tr. 7706–7707). In both trials the payments to Smith were freely testified to by government witnesses before Rowan gave his testimony. This testimony, supported by the records of payments to Smith, completely refuted Rowan's account.

Smith was arrested in New York City in April 1959 and shortly afterward agreed to work as a special employee for the Bureau of Narcotics (F. Tr. 3286–3289). Although there was some variance in the testimony as to the exact amount which Smith received each month, all the witnesses agreed that his per diem commenced at the time he started work for the government. This was in marked contradiction to Rowan's testimony that the per diem began only in April or May 1960, after Rowan made contact with Smith. Smith testified at the first trial that he was paid, from the date of his arrest and employment by the Narcotics Bureau to the date of his testimony, at the rate of approximately $360 per month, with the exception of two or three months (F. Tr. 2264–2268). About September 1959, he received $5,000 from the United States Government for his work in connection with the Canadian investigation. A month or two later,

he received $5,000 from the Canadian government after the Rogatory Commission (F. Tr. 2267–2268). All this occurred before Rowan allegedly made the offer of $5,000 in January 1960.

Agent Dolce testified with regard to a payment of $1,500 which, according to records produced by the government, had been made to Smith in February 1960. He stated that from September 1959 to January 1960, with his supervisor's knowledge, he had personally advanced Smith's per diem allowance, knowing that he would be reimbursed by the government. In February 1960, Dolce submitted a voucher for $1,500 (which Smith signed on February 29, 1960 (F. Tr. 5329)) and received his reimbursement in March. The $1,500 covered 150 days at $10 per day (F. Tr. 5199–5206). The voucher itself read (F. Tr. 5323):

> Per diem paid to Joe Beard [6] $10 per day for 150 days, commencing September 15, 1959, terminating January 28, 1960 for services rendered in connection.

Underneath was written (F. Tr. 5324):

> Received for cash subvoucher. To be used when invoice is not available. Received in cash from Narcotics Agent John M. Dolce $1,500—

Smith, too, testified that this sum reimbursed Dolce for money he had taken from his own pocket to pay Smith. Smith signed the voucher so that Dolce could be reimbursed (F. Tr. 5325–5326). The testimony regarding the payments to Smith was repeated, and the records again produced, at the second trial (Tr. 3074–3075, 3132, 3175).

[6] The name used for Smith on the Bureau's records.

There is no merit to the claim that such payments constitute bribery of a witness or have any relation to 18 U.S.C. 209. The payments were made under the authority of 31 U.S.C. 529a and were reasonable for the services rendered. Smith risked his life every time he dealt with Cotroni in Montreal and, after such dealings, conferred with agents of the American and Canadian governments. On one occasion, he and Agent Biase drove with the conspirators to Cotroni's house in the Laurentians, where Cotroni confronted him with his suspicions about Biase. Smith told Cotroni that Biase was his partner and that they would do business together or not at all (Tr. 1800-1811). By his calm behavior he was able to quiet Cotroni's suspicions and eventually to break this case. Smith was paid for his undercover work in a dangerous capacity.

3. *Reversal of the Panico contempt conviction.* The claim of prejudice from the extravagant conduct of Salvatore Panico, Mirra and other defendants was thoroughly canvassed in the extensive petitions filed in this case. This Court's decision reversing Panico's contempt conviction (*Panico* v. *United States*, 375 U.S. 29) on October 21, 1963, predated the denial of the petitions for writs of certiorari in the instant case (on December 9, 1963) and were called to the Court's attention by some of petitioner's co-defendants. The implications of that decision were discussed in the government's memorandum in opposition to the petition of co-defendant Mirra (No. 705 Misc., this Term), which was also denied on December 9. We there pointed out that the only issue decided by this

Court in *Panico* was that Panico's responsibility for his contumacious conduct should be determined after a hearing under Rule 42(b) of the Federal Rules of Criminal Procedure, rather than summarily under Rule 42(a). There was no determination that Panico was insane,* that his conduct was not contumacious, or that it prejudiced the jury against other defendants. This contention, like the allegation of denial of right to counsel, is merely an attempt to reargue matters raised in the original petition. For the reasons more fully discussed in the government's prior brief in opposition, neither point has merit.

Petitioner prays alternatively that, if his petition for rehearing is denied, it should be without prejudice to his proceedings under Rule 35, F.R. Crim. P., for a reduction of sentence. The government does not oppose that alternative prayer, though it will oppose a Rule 35 motion on the merits.

For the reasons stated, it is respectfully submitted that the petition for rehearing should be denied.

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APRIL, 1964.

*As we point out in our memorandum in No. 705 Misc., this Term, p. 3, New York State authorities, in fuller examination of Panico, have concluded that the earlier tentative diagnosis of schizophrenia was incorrect.